73-2003

NO.

Supreme Court, U. S.
FILED
JUL 9 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

SPIEGEL, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Spiegel, Inc. ("Spiegel"), seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit which granted enforcement of an order of the Federal Trade Commission ("FTC") that directed Spiegel, *inter alia*, to cease and desist from certain allegedly deceptive advertising practices relating to the offer of merchandise on a "free trial" or other basis "unless [Spiegel] clearly and conspicuously discloses in immediate conjunction therewith any credit restriction or condition which would make a customer ineligible to qualify

under such offer or any other restriction or condition applicable to such offer." (App. 21).*

OPINIONS BELOW

The opinion of the Court of Appeals and the dissenting opinion of Circuit Judge Pell, reported at 494 F.2d 59 are reproduced in the Appendix (App. 45). The order of the FTC and the dissenting opinion of former FTC Chairman Miles W. Kirkpatrick are reproduced in the Appendix (App. 20).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 18, 1974. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 16, 1974 (App. 60). This Petition was filed within 90 days of the Court of Appeals' denial of the Petition for Rehearing; and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the basic jurisdictional requirement of the Federal Trade Commission Act—that the purpose of a Complaint filed under the Act must be protection of the public interest—justifies the issuance of an order requiring that eligibility standards or criteria for qualification for the extension of credit be detailed in the advertising of free trial and discount offers of merchandise.

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* The "App." references are to the Appendix filed with this Petition. The "R." references are to the original Record of Proceedings before the FTC Hearing Examiner held in Washington, D.C. on December 29, 1971 and in Chicago, Illinois on April 18, 1972.

2. Whether the Court of Appeals erred in departing from the standards set forth by this Court in sustaining an order of the FTC which is (a) vague and excessively broad in scope and (b) bears no reasonable relationship to the issues actually adjudicated before the FTC.

STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 45 U.S.C. § 45(a)(1):

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. § 45(b):

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . ."

STATEMENT OF THE CASE.

For a number of years, Spiegel has, from time to time, offered to its customers, through direct mailings and advertising in the news media, various types of "free trial" offers and "discount" offers. "Free trial" offers permit the customer to utilize merchandise for a given period of time in order to determine whether he wants to keep the merchandise. If the consumer decides not to keep the merchandise, he may return it to Spiegel without charge. "Discount" offers (sometimes referred to as "percentage off" or "percentage off the usual amount" offers) permit a consumer to purchase merchandise at a given percentage price reduction below the price regularly charged for the merchandise in question.* Both classes of offers stated that they were subject to Spiegel's credit approval or subject to Spiegel's acceptance, so that if a customer decided to keep the merchandise and to pay for it by means of an extension of credit by Spiegel, the customer would have to satisfy Spiegel's established standards for the extension of credit. The basic issues presented in the instant case are whether the FTC has authority to order Spiegel to detail the circumstances under which credit will be extended in advertising the two classes of offers in question and, secondly, whether the FTC order, sustained by a divided Court of Appeals, requiring that the circumstances under which credit will be extended be detailed in Spiegel's advertising, is vague and ambiguous and is not reasonably related to the issues litigated before the FTC.

On November 8, 1971, the FTC issued its complaint against Spiegel, alleging, *inter alia*, that Spiegel, in mak-

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* Spiegel discontinued the "discount" offers in 1970, and they have not been resumed. (See page 5, *infra*.)

ing "free trial" or "discount" offers, failed to state with specificity that such offers were subject to credit approval by Spiegel and failed to detail the circumstances under which such credit approval would be granted or withheld. *

After counsel for Spiegel and the FTC stipulated that "credit approval by [Spiegel] is the only restriction or condition qualifying its advertised free trial offers or percent off offers" (Stipulation, dated March 27, 1972), a one-day hearing was held on April 18, 1972. At that hearing Spiegel's Vice President in Charge of Marketing, Nathan Braverman, and Maurice Lagnado, Spiegel's Assistant Treasurer, testified that:

(a) "Percentage off" offers were terminated in 1970 and will not be resumed.**

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* The FTC complaint is hardly free from ambiguity. The complaint charged simultaneously that Spiegel used deceptive advertising by offering to deliver merchandise on a "free trial" basis *in an effort to make sales*, while other allegations of the complaint alleged that Spiegel used identical deception to *refuse* to make delivery of merchandise to certain applicants who sought to take advantage of Spiegel's "free trial" offers (App. 4-5). Moreover, although the complaint alleged that the free trial use of merchandise was withheld because the consumer was not informed that credit approval was a contingency of the offers, the illustrative advertisement set forth in paragraph Four-C of the complaint (App. 3) stated that "[n]aturally to be accepted for a Spiegel Budget Power account, you must be steadily employed, reside at a permanent address, and have a good record." The Hearing Examiner, at the initial pre-hearing conference on December 29, 1971, raised the question of the need for an order to protect the public interest where the complaint itself contained evidence that the consumer was informed of the conditions with respect to the offers (R. 24-29; App. 23-27) and also noted that the complaint was ambiguous in that it alleged that sales *are being made* through deception and simultaneously that Spiegel *refuses* to make sales to persons failing to meet certain undisclosed credit standards (R. 24, 29; App. 23, 26).

** R. 48-49, 73; App. 32-33, 34.

(b) The determination of credit acceptability is a complex subject involving the weighing of many complex factors. To increase the complexity, the factors are continuously changing and the importance of any given factor changes from time to time.*

(c) To Mr. Braverman's knowledge no "percentage off" or "free trial" offers were mailed from 1967 to the present time without a statement of conditions applicable to the offer.**

(d) In regard to the Commission's Exhibit A (CX-1Z5), the order blank is missing and the Exhibit is therefore incomplete. ***

(e) The application form for "free trial" and "percentage off" merchandise always contained the condition that the order was subject to acceptance by Spiegel. ****

(f) In all categories of its advertising, there is attached to the order blank a postage-free envelope. *****

The documentary evidence produced by complaint counsel consisted of the stipulation and a series of Spiegel's advertisements, each one of which contained in one form or another an express credit approval condition with respect to the offer. The only exhibit without such notification was identified by Mr. Braverman as incomplete be-

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* R. 59, 77-78, 81, 95-98, 109, 112; App. 33-34, 37-40.

** R. 73-75; App. 34-35.

*** R. 55; App. 33.

**** R. 73-74; App. 34-35.

***** R. 84; App. 39.

cause the stamped application blank, which recited the customary qualifying language, was missing. *

Following the hearing, both Spiegel and complaint counsel appealed from the Initial Decision of the Hearing Examiner. The FTC, after oral argument, entered its order on January 9, 1973, with Chairman Kirkpatrick dissenting. The Commission adopted the following order after granting complaint counsel's appeal and denying Spiegel's appeal:

> "It is Ordered that respondent Spiegel, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of clothing, household appliances, kitchenware, bedding, furniture, radios, luggage, tools, tires, or other article of merchandise, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> (1) Representing, directly or by implication, to prospective credit customers that merchandise is being offered on a free trial basis, or at a percentage or amount off the usual and regular price, unless respondent clearly and conspicuously discloses in immediate conjunction with such offer that it is subject to respondent's credit approval.
>
> (2) Representing, directly or by implication, to respondent's established credit customers that merchandise is being offered on a free trial basis unless respondent clearly and conspicuously discloses in immediate conjunction therewith any credit restriction or condition which would make a customer ineligible to qualify under such offer

* R. 55; App. 33.

or any other restriction or condition applicable to such offer.

(3) Failing to clearly and conspicuously disclose at the top of questionnaires requesting information from prospective credit customers ordering merchandise pursuant to a free trial offer or other offer that it is an application for credit and that merchandise will be sent to the prospective customer only if such customer is approved for credit by respondent.

(4) Representing, directly or by implication, that an offer of a free trial of merchandise, a reduction in the price of merchandise, or any other kind of offer is made or is available without conditions or restrictions when such offer is subject to conditions or restrictions not revealed therein."

The then Chairman of the Federal Trade Commission, Miles W. Kirkpatrick, refused to join his fellow Commissioners in affirming the Initial Decision of the Hearing Examiner. Chairman Kirkpatrick dissented as follows:

"I cannot agree that consumers would fail to appreciate that Spiegel's free-trial offers necessarily were subject to acceptance by Spiegel. The nature and amount of information obtained by Spiegel on its application forms, in my opinion, puts the consumer on notice that Spiegel has established criteria which prospective customers must meet prior to receiving the merchandise on a free-trial basis. It seems to me unlikely that a consumer would conclude that the information provided on the application form was irrelevant to Spiegel in deciding whether or not to provide the consumer with the offered merchandise.

"Of course, it is arguable that some few prospective customers who sent in filled-in application forms may not have fully understood the conditional nature of

the offer. Also, I appreciate that economic injury is not always a condition precedent to an order under Section 5. However, *in the circumstances of this case where no economic loss of any consequence appears and where no testimony was received with respect to consumers' understanding of the import of the application forms or whether Spiegel's disclosures were in fact sufficient, the entry of an order is not warranted.*" (Emphasis added.)

On petition for review, the Court of Appeals for the Seventh Circuit, in a two-to-one decision, concluded, *inter alia*, that "[t]here is no merit in Spiegel's contention that the [FTC] order should be set aside as too trivial for Commission attention" (App. 48) and that the FTC "order is reasonably related to the violations found" (App. 52). Circuit Judge Pell, dissenting, concluded that "[i]f for no other reason, the order of the FTC should be set aside by this court because of the utter triviality of the matter involved" (App. 54) and that "in any event, the order entered by the Commission is far too broad and is unjustified by this particular velitation." (App. 59).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals Presents Important Questions Concerning Whether the Jurisdiction of the Federal Trade Commission to Issue Cease and Desist Orders in the Public Interest Justifies the Issuance of an Order Requiring That Eligibility Standards or Criteria for Qualification for the Extension of Credit Be Detailed in the Advertising of Free Trial and Discount Offers of Merchandise.

At least since the decision of this Court in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), it has been well-established that "to justify the Commission in filing a complaint under § 5 [of the Federal Trade Commission Act], the purpose must be protection of the public." *Id.* at 27. This basic jurisdictional requirement is contained in Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. § 45(b), which permits the FTC to issue a complaint "if it shall appear to the Commission that a proceeding by it . . . would be *to the interest of the public*. . . ." (Emphasis added.) As explained by Mr. Justice Brandeis, writing for the Court in *Klesner*:

> "[t]o justify filing a complaint *the public interest must be specific and substantial.* Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and

> widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." *Id.* at 28. (Emphasis added and citations omitted.)

Accord, *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 649 (1931), where this Court noted that

> "the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, *the Commission still may not proceed unless it further appears that a proceeding would be to the interest of the public, and that such interest is specific and substantial.*" (Emphasis added.)

See *Federal Trade Commission* v. *Milling Co.*, 288 U.S. 212, 217 (1933).

The various courts of appeals, which have primary responsibility to review FTC orders, have generally followed the standards set forth by this Court,* although not infrequently, as in the present case, a court of appeals has been sharply divided as to whether a particular FTC proceeding met the statutory "public interest" criterion. Thus, for example, in *Exposition Press* v. *FTC*, 295 F.2d 869, 876-877 (2nd Cir. 1961), Judge Friendly, dissenting from a decision of a panel majority which had affirmed an FTC order, stated:

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* See, *e.g.*, *Marcus* v. *FTC*, 354 F.2d 85, 87 (2nd Cir. 1965); *S. Buchsbaum & Co.* v. *FTC*, 160 F.2d 121, 123 (7th Cir. 1947); *Northam Warren Corp.* v. *FTC*, 59 F.2d 196, 198 (2nd Cir. 1932); *Flynn & Emrich Co.* v. *FTC*, 52 F.2d 836, 838-839 (4th Cir. 1931); *Arnold Stone Co.* v. *FTC*, 49 F.2d 1017, 1019 (5th Cir. 1931).

"In F.T.C. v. Klesner, 1929, 280 U.S. 19, 30, 50 S.Ct. 1, 4, 74 L.Ed. 138, the Supreme Court held that although the Commission's preliminary determination that institution of a proceeding is in the public interest 'will ordinarily be accepted by the courts,' *such action 'is subject to judicial review'; that if it appears at any time that the proceeding is not in the public interest, the Commission ought dismiss the complaint; and that if the Commission nevertheless enters an order, 'the court should without enquiry into the merits, dismiss the suit.'*

"It is deeply significant that the Klesner opinion was written by Mr. Justice Brandeis. For 'he, more than any other man, was the begetter' of the Federal Trade Commission. Two years before that opinion, Henderson had published his critical study of the Commission, suggesting, among other things, that 'it should exercise a greater discretion in selecting those cases which involve questions of public importance' and querying, as to the Klesner proceeding, 5 F.T.C. 24 (1922), 'what there was in the case to call for the intervention of a federal administrative tribunal.' It is hardly accidental that Mr. Justice Brandeis placed the Supreme Court's decision in Klesner on the ground that he did, rather than simply affirming the Court of Appeals, 1928, 25 F.2d 524, 58 App.D.C. 100, on the merits. His opinion was a summons to the Commission to do what it had been created to do, to get on with 'the great purpose of the act,' as Mr. Justice Sutherland, also not without direct knowledge of the Act's origins, was later to say in an opinion in which Brandeis joined, F.T.C. v. Raladam Co., 283 U.S. at page 650, 51 S.Ct. at page 591, 75 L.Ed. 1324. True, as my brothers point out, Klesner involved a private controversy as the instant case does not; *but the basis of the Klesner decision was not the presence of a private interest but the absence of a public one.* In Moretrench Corporation v. F.T.C., 2 Cir., 1942, 127 F.2d 792, 795,

> Judge Learned Hand, reviewing Klesner in the light of subsequent decisions, said that it '*is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission.*' See also S. Buchsbaum & Co. v. F.T.C., 7 Cir., 1947, 160 F.2d 121, 123. . . . [T]he government funds that have been spent on this proceeding, not to speak of the diversion of energies from more worthwhile tasks, outrun any possible public benefit by a tremendous margin." (Emphasis added and footnotes omitted.)

Various commentators and study groups have likewise observed that the Commission devotes an excessive amount of its resources to trivial matters. As early as 1924, only nine years after the Commission had begun to operate, it was stated that

> "the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern." G. Henderson, *The Federal Trade Commission* 337 (1924).

Similarly, the Hoover Commission noted in 1949 that

> "in the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance." Commission on the Organization of the Executive Branch of the Government, 81st Cong., 2d Sess., *Task Force Report on Regulatory Commissions*, app. N, 128 (Comm. Print 1949).

More recently, The President's Advisory Council on Executive Organization, in its report entitled *A New Regulatory Framework* (January, 1971), stated:

> "Much of the criticism of the FTC is aimed at its disproportionate attention to comparatively trivial matters—resulting largely from the breadth of its mandate and compounded by inherent deficiencies of the collegial form of organization. Preoccupation with minutiae over the years has created a 'jack of all trades—master of none' profile for the FTC." *Id.* at 87.

In a review of recent FTC decisions, Professor Richard A. Posner of the University of Chicago Law School stated the following with specific reference to the instant case as decided by the FTC:

> "The residual category of marginal cases in the 1972-1973 sample contains a number of interesting illustrations of the commission's concern with practices not in fact seriously deceptive. . . .
>
> "A fourth case involved a disclosure in a mail order house's catalogue that 'all orders are subject to [firm name]'s credit approval.' The commission held that this did not apprise the customer with sufficient clarity that monthly payments must be paid regularly by the customer and that other conditions must be met before credit would be extended. The element of deception is, at the very least, elusive. Everyone knows that conditions such as prompt payment are ordinarily attached to the extension of credit." Posner, *Regulation of Advertising by the FTC* 26-27 (American Enterprises Institute, Evaluative Studies, 1973).

It is difficult to conceive a proceeding with less public interest, within the meaning of the foregoing authorities, than the instant case. Chairman Kirkpatrick in his dissenting opinion (pages 8-9, *supra*) cogently pointed out the needlessness of an order where reasonable notice was in fact given of the requirement of credit approval to

those to whom Spiegel's advertising was directed and there was no evidence that anyone was injured. *

Moreover, even if evidence had been produced to demonstrate that no statement was made of the contingency of credit approval (and all the evidence was to the contrary), the Commission defaulted on the issues of any possible prejudice or injury to the public or to Spiegel's competitors. No evidence was presented that any consumer had been misled or reasonably could have been misled. No consumer was identified as having been rejected for failure to meet Spiegel's credit standards. No evidence was presented that any of Spiegel's competitors had been affected.**

It is important in this connection to emphasize, as Judge Pell noted in his dissenting opinion, that

> "[t]his is not a case where we are dealing with hidden charges which would vitiate the supposed discount,

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* It is also significant that Chairman Kirkpatrick, before his appointment as Chairman of the Federal Trade Commission, was Chairman of the American Bar Association Committee which conducted a detailed study and appraisal of the Federal Trade Commission. *Report of ABA Commission to Study the Federal Trade Commission*, dated September 15, 1969. At page 2 of the comprehensive report of the Kirkpatrick Committee, the following comments are found:

> "Turning to specific areas of FTC efforts, we find, first, that in the field of consumer protection, the agency has been preoccupied with technical labeling and advertising practices of the most inconsequential sort."

** To the contrary, Spiegel attempted to demonstrate that its practices had no capacity to injure its competitors because Spiegel was merely following customary practices in advertising various offers of merchandise. The Hearing Examiner, however, prevented Spiegel from making any showing as to the practices of any of its competitors. This action, in and of itself, deprived Spiegel of a fair hearing before the FTC. Cf. *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938).

nor one where the applicant was supposedly getting a free trial but was actually required to keep the goods once they reached his possession. In fact, the parties stipulated that credit approval was the only restriction or condition qualifying these offers.

* * *

"Under any interpretation of the advertising material, it is clear that one cannot partake either of the free trial period or the discount without filling out and signing the order form. It is necessary for the prospective free trial user or discount applicant, if a new customer, to give detailed information about marital status, income, financial obligations, nature of employment, and similar factual data for credit evaluation. In varying language, the order form makes it clear that all orders are subject to acceptance by Spiegel. As to established credit customers, I cannot conceive that they were not already aware of the fact that a favorable credit rating is required and that if they are delinquent they will not be the beneficiary of further unpaid-for utilization of Spiegel merchandise." (App. 56-57.)

The majority opinion apparently, though the matter is not entirely free from doubt, did not disagree with the basic thrust of Judge Pell's analysis. Thus the majority opinion states that

> "[t]he Commission did *not* find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the 'free trial' and 'percent off' offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, *the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.*" (App. 51.) (Emphasis added.)

The majority opinion similarly is critical of Spiegel for not "positioning conditions where the average person in

Spiegel's market would be likely to overlook them." (App. 52.) If, as the majority opinion states, the allegedly deceptive practice "was in the placement and print size of the conditions, not the lack of statement of [credit] conditions," then it is indeed difficult to understand why the dissenting opinion is not correct in the view that "the order of the FTC should be set aside . . . because of the utter triviality of the matter involved." (App. 54.)

The significance of this case does not lie in the mere fact that Spiegel has been ordered by the FTC and the Court of Appeals to inform its free trial and discount customers that these particular offers are subject to Spiegel's credit approval. While Spiegel has insisted that it does adequately inform these customers of the condition of credit approval, nevertheless Spiegel requested, as alternative relief in the Court of Appeals, that the Court modify the FTC's order so as to leave standing that portion of the order which requires Spiegel to advise its customers that free trial offers are subject to credit approval. This step is, and would be, unobjectionable to Spiegel. The burdensome and unjustified aspect of the FTC order is the requirement that, beyond the factor of credit approval, Spiegel must state in its advertising the criteria which may make a customer ineligible for the extension of credit.

Moreover, the importance of the instant case lies in the fact that, as the dissenting opinion noted (App. 59), numerous other companies have engaged, and do currently engage, in the practice of making free trial offers. Thus the basic questions of whether the placement and print size of credit conditions which may accompany such offers are matters of such importance as to require FTC regulation in the "public interest," and, if so, the extent of the regu-

lation which is permissible or appropriate, are matters that gravely concern not only Spiegel but also numerous other companies. Unfortunately, the confusion for all companies which may be concerned is exacerbated by the fact that the majority opinion of the Court of Appeals has sanctioned a sweeping cease and desist order that, for reasons more fully elaborated in Section II of this Petition, do not appear to be consistent with the majority's opinion's basic analysis of the issues involved in the present case.

Moreover, the majority opinion, by ignoring the common practices which are used by sellers who provide retail credit to their customers, casts a serious shadow of doubt upon closely-related, commonly used and wholly legitimate retail credit practices. For example, one need only examine virtually any newspaper where numerous advertisements can be found relating to the sale of merchandise on credit which contain only a phrase such as "Just say charge it," "Charge it," or references acknowledging that the retail seller honors "all national credit cards." There is, in such advertisements, a complete absence of any admonition to the prospective customer similar to those which the FTC would impose upon Spiegel such as that (a) he must establish an account in order to "Charge it," (b) if an account is opened, that he must keep up his payments in order to add new purchases, (c) if a credit card is involved, that his credit standing with the issuer of the card must be unimpaired, or (d) that he does not exceed the credit limits set in his credit card or his credit account. Presumably, though in view of the Court of Appeals' decision the matter is no longer free from doubt, the universal absence of such warnings concerning credit conditions or limitations in advertisements does not constitute mass deception in retail credit advertising. Spiegel submits, as Judge Pell

stated in his dissenting opinion (App. 57), that credit users already know the obvious without reminders that credit must be established prior to its use and that its continued use is conditional upon maintenance of agreed payments and subject to credit limitations. The presumed expertise of the FTC, therefore, should not be permitted to override common sense and common knowledge of retail credit users. In short, fiction should not be allowed to triumph over intuitively obvious facts simply because the FTC chose to ignore the realities of everyday credit transactions.

Finally, the order adopted by the FTC, and enforced by the Court of Appeals, actually contravenes the public interest because its clear tendency will be to curtail sharply, if not to eliminate entirely, the use of free trial offers.* It is self-evident that a consumer's interest is served by a free trial use of merchandise. A product found to be unuseful for any reason can be returned to Spiegel or to any other honest vendor under the terms of a free trial offer. No questions are asked. The FTC, however, in its pursuit of trivial matters, will at a minimum curtail the use of free trial offers or discount offers as a retail selling method. The vice that afflicts the FTC is clearly apparent in the instant case. If the FTC were acting in the public interest, it would encourage free trial offers as one of the fairest methods of selling now in existence.

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* The extent to which such curtailment will occur is presently a matter of some speculation because the ambiguities and inconsistencies inherent in the FTC order and the majority opinion of the Court of Appeals leave wholly unclear what is required of sellers that currently use the free trial method of selling. See pages 20-27, *infra*. What does seem clear is that the order, as interpreted by the FTC before the Court of Appeals (page 23, *infra*), will have a marked effect upon the continued use of free trial offers.

II.

The Court of Appeals Erred in Departing From the Standards Set Forth By This Court in Sustaining an Order of the FTC Which Is (a) Vague and Excessively Broad in Scope and (b) Bears No Reasonable Relationship to the Issues Actually Adjudicated Before the FTC.

This Court has repeatedly stressed that an FTC order must bear a "reasonable relation to the unlawful practices found to exist," *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952), and that FTC orders "should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." *FTC* v. *Milling Co.*, 288 U.S. 212, 217 (1933). See *e.g.*, *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946). As this Court stated in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965):

> "This Court has also warned that an order's prohibitions 'should be clear and precise in order that they may be understood by those against whom they are directed.' Federal Trade Comm'n v. Cement Institute, [333 U.S. 683, 726 (1948)] and that '[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.' Federal Trade Comm'n v. Henry Broch & Co., 368 U.S. 360, 367-368." *

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* As the Court of Appeals for the District of Columbia noted recently in modifying an overly broad and ambiguous FTC order:

> "We do not feel that approval of the order in its present form is a prudential resolution of this issue. Examination of the entire order does suggest that perhaps petitioners may be unduly sensitive to the language of certain parts. Nonetheless, *portions of the order do speak in sweeping terms and may leave*

(Footnote continued)

If anything is clear in the context of the present, it is that both the FTC and the Court of Appeals majority opinion fell far short of following the guidelines and standards consistently applied by this Court. In order to place these deficiencies in their proper perspective, a brief review of the FTC and Court of Appeals proceedings is required.

In the first instance, as the majority opinion correctly noted,

> "The parties at the [FTC] hearing stipulated that the *sole issue* before the examiner was whether Spiegel's advertisements of *'free trial' offers or 'percent off' offers* are unfair or deceptive because of the manner in which customers are notified of Spiegel's requirement of *credit approval* in order to obtain the benefit of such offers." (App. 52 n.6.) (Emphasis added.)

Notwithstanding the carefully defined issues detailed in the stipulation, the Hearing Examiner ordered Spiegel to cease and desist from:

(Footnote continued)

> *petitioners justifiably uncertain as to what they can, and what they cannot, do. We think that an ordering provision should be as free of ambiguity as possible.* Thus we feel it appropriate to exercise our power of appellate modification, 15 U.S.C. § 45 (d), to recast the order in more specific terms corresponding with the interpretations of the present order that the Commission has offered to this court. While recognizing that our modification may in some respects compound the already existing redundancy of some of its provisions, a redundant cease and desist order is, surely, preferable to an ambiguous one." *Diener's, Inc.* v. *FTC*, 494 F.2d 1132, 1134 (D.C. Cir. 1974). (Emphasis added.)

See, *e.g.*, *American Home Products* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968) and cases cited therein; *Asheville Board of Trade* v. *FTC*, 294 F.2d 619, 628 (4th Cir. 1961). See also *Cotherman* v. *FTC*, 417 F.2d 587, 595-596 (5th Cir. 1969).

> "Representing, directly or by implication, that merchandise is being offered on a free trial basis or at a percentage or amount off the usual and regular price *unless substantially all credit restrictions or conditions applicable to such offers are clearly and conspicuously disclosed in reasonably immediate connection therewith.* (App. 19.) (Emphasis added.)

The FTC complaint counsel, apparently disturbed by the vagueness and overbreath of the Hearing Examiner's order, stated in his appeal brief to the full Commission:

> "Bearing on these questions is evidence in this case that Spiegel determines credit eligibility of prospective credit customers by the use of numerous factors as reflected in its 'Credit Analyzer' (CZ-2). These factors could possibly be construed to be the credit restrictions or conditions referred in both forms of orders. If so interpreted, these factors as a practical matter could not be set forth with the free trial offer because of limits on advertising space. *In effect, then, it would absolutely ban free trial offers by [Spiegel]. In these circumstances it would seem appropriate to rephrase the order so that credit approval is identified as the condition to be disclosed to avoid misunderstanding or confusion as to what the order requires in this regard.*" Complaint Counsel Brief, July 28, 1972, page 4. (Emphasis added.)

In response to complaint counsel's observations, the FTC did indeed modify the Hearing Examiner's order, adopting the four-part order previously set forth in full at pages 7-8, *supra*. However, in so doing, the FTC merely added further confusion and uncertainty with respect to the scope of the order. In the first instance, the FTC order, in paragraphs 1 and 3 thereof, purported to distinguish between Spiegel's new customers and its established customers, an issue which was not within the scope of the stipulation. More importantly, the FTC retained, particularly

in paragraph 4 of its order, the vague and ambiguous language of the Hearing Examiner's order. Indeed, in at least one respect the FTC order is even broader than that proposed by the Hearing Examiner because, while the Hearing Examiner limited his order to free trial offers and percentage or amount off the usual price offers, the Commission included in paragraph 4 of its order restrictions with respect to "any other kind of offer" and in paragraph 3 restrictions as to "a free trial offer or other offer."

In the Court of Appeals, faced with the necessity of defending an order vague and ambiguous on its face, the FTC attempted to give more specific content to the terms of the FTC order derived from the Hearing Examiner's Initial Decision. Thus the FTC stated in its brief to the Court of Appeals:

> "In summary terms, Spiegel has failed to disclose to potential new customers that its offers are conditioned on approval of each offeree as a credit risk, and to disclose to established customers that the offer is conditioned on their having their account up to date, having made monthly payments on time, having used their accounts within the previous twelve month period, and not ordering merchandise in excess of their particular credit limit when aggregated with their present outstanding balance." FTC Brief, page 27.

Of course, if the foregoing is in fact what the FTC order is intended to mean, it is entirely unclear why the FTC could not have so stated in specific and precise terms as it is required to do under the principles consistently enunciated by this Court. Moreover, whatever interpretation of the order may have been represented to the Court of Appeals, it was the FTC order as written which the Court of Appeals ordered to be enforced, not the interpretive gloss placed thereon in the FTC brief or the Initial Decision of the Hearing Examiner.

Briefly stated, the ambiguities and overbreadth of the FTC order may be summarized as follows:

Paragraph 4 of the FTC order directs Spiegel to cease

> "[r]epresenting, directly or by implication, that an offer of a free trial of merchandise, a reduction in the price of merchandise, *or any other kind of offer* is made or is available without conditions or restrictions when such offer is subject *to conditions or restrictions* not revealed therein." (Emphasis added.)

The *only* issues raised before the FTC related to Spiegel's free trial and percentage off offers; yet, paragraph 4, in referring to "any other kind of offer," is, on its face, completely open-ended and thus has no conceivable relationship to the narrow issues litigated before the FTC.* Likewise, the phrase "conditions or restrictions" is certainly overly broad, for the *only* issues raised before the FTC related to *credit* restrictions or conditions.** What other types of offers—apart from free trial and percentage off—and what other classes of "conditions or restrictions"—other than credit conditions—the FTC has in mind remains a total mystery because the issues were neither raised nor litigated before the Commission, a fact which even the majority opinion tacitly concedes. See page 21, *supra*. As previously noted, according to the FTC's Brief filed in the Court of Appeals, the credit restrictions or conditions are at least four in number. But it is hardly clear how the Commission can read these specific factors into the broad language of paragraphs 2 and 4.

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* Paragraph 3 of the FTC order suffers from the same vice in its reference to "a free trial offer or other offer."

** Similarly, Paragraph 2 of the FTC order refers to "any other restriction or condition" without any limitation whatsoever to *credit* restrictions, the only matter litigated before the FTC.

In view of the convoluted history of this case, it is not surprising that the majority opinion of the Court of Appeals exhibits basic inconsistencies. Indeed, it is not entirely clear from the majority opinion precisely how Spiegel has allegedly engaged in deceptive practices. Thus the majority opinion states that "[t]he promise of an unconditional 'free trial' or 'percent off,' when both are conditional, is not in the public interest. A good society depends upon promises being kept." (App. 50.) The implication from this passage is that Spiegel did not disclose that its offers were subject to Spiegel's credit approval, an implication which is also purportedly supported by the example of Spiegel's advertising material quoted in the majority opinion. (App. 51.)* If non-disclosure is the thrust of the majority's analysis, it wholly ignores the uncontradicted testimony that *all* orders made pursuant to any offer were received *only* on order blanks, all of which stated that they were subject to Spiegel's acceptance. See pages 5-7, *supra*.

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* It should be noted that the free trial offer circular, upon which the majority opinion heavily relies (App. 51), was discontinued in the fall of 1969, fully two years prior to the filing of the FTC complaint against Spiegel on November 8, 1971. Beginning in January, 1970, similar circulars contained the express notice that "all orders [are] subject to [Spiegel's] final acceptance," or similar notices. Thus the majority opinion, like the FTC in its brief to the Court of Appeals, has, in effect, chosen to condemn Spiegel's conduct by relying upon long-discontinued advertising material. It would appear, therefore, that the panel majority failed to take into account the record as a whole when it concluded that the FTC order should be enforced. This procedure is inconsistent with the standards for agency review established by this Court which requires that an agency's findings be set aside when the record before the Court of Appeals indicates that the agency's decision is not justified "by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within the special competence or both." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951).

The majority opinion, however, goes on to state that:

> "[t]he Commission did *not* find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the 'free trial' and 'percent off' offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, *the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.*" (App. 51.)

If, as the majority opinion indicates, the allegedly deceptive practice "was in the placement and print size of the conditions, not the lack of statement of [credit] conditions," then the holding of the majority opinion is difficult to square with the broad order entered by the FTC, which, however viewed, is *not* limited to "the placement and print size of the [credit] conditions." See pages 21-24, *supra*. Specifically, a statement of specific credit restrictions or conditions is inconsistent with the majority opinion's conclusion that "the alleged deceptive factor was in the placement and print size of the conditions, *not the lack of statement of conditions*" and that Spiegel had erred only "*by positioning conditions* where the average person in Spiegel's market would be likely to overlook them." (App. 51, 52.) (Emphasis added.)

In short, what apparently occurred is that the majority of the Court of Appeals ordered the enforcement of an FTC order which is not only ambiguous and overly broad on its face, but which is, additionally, inconsistent with the majority opinion's analysis that only the placement or positioning and print size of credit conditions in connection with free trial or percentage off offers were at issue.

The end result of the proceedings, both before the FTC and the Court of Appeals, is to leave not only Spiegel, but

also numerous other companies similarly situated, totally at a loss to understand what is to be required by way of disclosure of conditions which may affect offers to be made in the future. In short, the present case is a classic illustration of the failure of the FTC and the Court of Appeals to comply with the repeated admonitions of this Court that FTC orders must be fashioned "which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965), and cases cited therein.

Because the Court of Appeals has so far departed from the standards consistently set forth by this Court for the enforcement of FTC orders, and because the majority opinion of the Court of Appeals creates massive confusion as to what is required of retail vendors, including, but not limited to, Spiegel, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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